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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1337

LEE WARD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas, Western Division (R. 9–16) is reported at 65 F. Supp. 9. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 22–28) is reported at 158 F. 2d 499.

JURISDICTION

The judgment of the circuit court of appeals was entered December 12, 1946 (R. 28). Petition for rehearing (R. 29–33) was denied on January 7, 1947 (R. 35). On motion of the petitioner time for filing the petition for a writ of certiorari was

extended until May 8, 1947. The petition for a writ of certiorari was filed May 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the assignment of the duties of a title attorney to an enlisted yeoman in the Naval Reserve while on active duty in time of war and receiving the pay of his grade, entitles him to recover, under the Tucker Act, compensation for the value of his services as an attorney.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

On October 31, 1945, petitioner filed a complaint against the United States under the Tucker Act (28 U. S. C. 41 (20)) in the United States District Court for the Eastern District of Arkansas, Western Division, seeking to recover the sum of $6,500.00, allegedly due and owing to him for services rendered as a title attorney while serving as an enlisted yeoman in the Navy during World War II (R. 1–8). The United States moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter, and that the complaint failed to state a claim against the United States upon which relief could

be granted (R. 8). The district court sustained the motion to dismiss on the ground that the complaint failed to state a cause of action (R. 9), and the court below affirmed (R. 28).

The allegations of the complaint may be summarized as follows: Petitioner, a licensed attorney with specialized training and experience in the accumulation and interpretation of land title evidence, enlisted in the Naval Reserve on August 8, 1942 (R. 1). At the time of his enlistment, the local Naval recruiting officer assured him that the Navy had no need for him in any legal capacity but did have urgent need for his earlier experience in clerical and secretarial work (R. 1–2). The recruiting officer further assured him that if his legal qualifications were needed and used at some later date the Navy would not only be willing but anxious to pay him in proportion to the value of the services he performed (R. 2). Relying upon these statements and the published literature used in the Navy's recruiting program, petitioner volunteered as a yeoman and was immediately sworn in (R. 2). He was called to active duty on September 13, 1942 (R. 2).

On June 1, 1944, while serving as a yeoman in Hawaii, petitioner was assigned to the duties of a title attorney under a Naval officer in the Real Estate Division, District Public Works Office, Fourteenth Naval District, in Honolulu (R. 2). In the performance of these duties, petitioner

made a large number of land title examinations. The majority of these examinations were "for private individuals, corporations, and trust estates under an arrangement by which the Navy loaned [petitioner's] professional training and skill * * * for their private use and benefit" for the purpose of expediting the Navy's program (R. 5). The only compensation petitioner received for this work was the money the Navy normally paid all men with petitioner's enlisted grade (R. 5).

After performing these duties for several months, petitioner called the attention of the Officer-in-Charge to the fact that petitioner was not being paid by the Navy in proportion to the responsibilities imposed on him (R. 5). The Officer-in-Charge admitted petitioner's contention but stated that there was little or nothing he could do about it, and further suggested that petitioner should be happy to be doing work so closely related to his private law practice (R. 5). The Officer-in-Charge further contended that it was his duty to use petitioner's professional skills in a manner most valuable to the Navy's program whether or not he was able to obtain commensurate pay for petitioner (R. 5). Petitioner then requested to be reassigned to yeoman's duties in keeping with his grade and pay, which request was refused (R. 5).

After failing in every attempt to obtain either pay commensurate with the professional services

he was performing or reassignment to duties in line with the pay he was receiving, petitioner applied for discharge from the Navy through official channels (R. 5). He was called in for a personal interview by one Commander McHenry, who was Assistant to the Executive Officer in charge of the activity. During the interview the Commander conceded that petitioner had a legitimate grievance and was entitled to have his pay increased or his duties changed (R. 6); he further told petitioner that if he withdrew his request for discharge, a positive effort would be made to bring his pay into line with his duties (R. 6). Petitioner withdrew his request, and Commander McHenry carried out his promise to assist petitioner in presenting his case to the proper superior officers (R. 6). A file was accumulated showing in detail the professional nature of petitioner's duties and carrying various recommendations for an increase in pay, and was brought, through official channels, to the attention of the Chief of the Bureau of Yards and Docks and the Chief of the Bureau of Naval Personnel (R. 6). In due time, petitioner was notified that the recommendation for an advance in his pay was denied for the reason that an adequate supply of qualified commissioned officer personnel to meet the current needs of the service was available (R. 6). Petitioner thereupon requested reassignment to duties in keeping with his grade and pay as a

yeoman (R. 6), but the Officer-in-Charge, in the exercise of his military control over petitioner as an enlisted man, directed petitioner to continue with the duties then assigned him (R. 6). Petitioner had no choice under military law but to continue with his professional duties or face court-martial for insubordination (R. 6). Petitioner performed these duties in a capable and professional manner until September 21, 1945, when he was detached for discharge from the Navy, and he was discharged shortly thereafter (R. 2).

Petitioner in his complaint claims that the minimum just and reasonable compensation for the professional legal services he rendered was $8,000 a year, or a total of $10,000 for the 15-month period during which he rendered these services (R. 7). Conceding the right of the United States to offset against this claim $3,500, representing all salary and allowances actually paid him as an enlisted yeoman during this period, petitioner prayed judgment against the United States in the amount of $6,500 (R. 8).

ARGUMENT

Petitioner seeks to recover the reasonable value of the services he rendered the Navy as a title attorney while he was an enlisted yeoman in the Navy and was receiving the pay and allowances of that grade. The basis of his claim is not clear

since petitioner originally stated one theory in his complaint, but, during the course of the litigation, adopted another theory which is set out in his petition. In the complaint, petitioner's theory basically was that the Government was bound to pay him compensation commensurate with the responsibilities and duties of a title attorney, particularly since he was induced to enlist by representations that he would be so paid (R. 1–7). In the petition, however, no mention is made of this theory; instead, petitioner bases his claim to relief on R. S. 355, as amended (34 U. S. C. 520), *infra*, p. 15, which authorizes the heads of departments to expend moneys for the procurement of land title evidence and which he contends contains "a specific promise by the United States of America that whoever might be employed to do the work would be paid reasonable compensation" (Pet. 6–7). We submit that neither theory advanced by petitioner supports recovery.

1. The assignment of the petitioner to the duties and responsibilities of a title attorney while an enlisted yeoman in the Navy does not of itself entitle him to recover the full value of the services he performed as such attorney. Apart from the change in his duty assignment, there was no change in his status; petitioner was still in the Navy with the rate of an enlisted yeoman. While he was in the Navy, petitioner attempted several times either to have his compensation increased in

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proportion to his increased responsibilities through a change in status, or to be reassigned to the performance of duties in line with the pay he was receiving. Every such attempt, however, failed and, as pointed out by the court below, these efforts "indicate that he [petitioner] did not expect additional pay unless he was able to secure some change in his status" (R. 27). We submit that petitioner could not properly entertain any greater expectations.

As an enlisted yeoman, petitioner was entitled to receive, and the Navy was authorized to pay him, only the pay established for men of his grade by the Pay Readjustment Act of 1942 (56 Stat. 359, 37 U. S. C. 101 *et seq.*), which fixes compensation for the various members of the armed forces in terms of grade or rank, and not in terms of responsibilities discharged or duties performed. See, particularly, Sections 9 and 14, *infra,* pp. 13–15. And if petitioner had succeeded in obtaining a change in his status, the additional compensation would have been measured not by the reasonable value of his services as a title attorney, but, rather, by the pay fixed for his new status by the Pay Readjustment Act.

This limitation on the compensation of members of the armed forces has long been recognized and accepted. We have found no other case dealing with such a claim by a member of the armed forces, although it is common knowledge that

there were innumerable instances in World War II, as well as in other wars, where, because of some special ability, experience, or training, members of the armed forces were called upon to perform, without additional compensation, duties which would normally be assigned to persons of higher grade or rank, and which would command even higher compensation in commercial fields. In time of war citizens of the United States must render military service and are subject to conscription into the armed forces even without any compensation. *Selective Draft Law Cases,* 245 U. S. 366, 378; cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29; *Butler* v. *Perry,* 240 U. S. 328, 333; *Commers* v. *United States,* 159 F. 2d 248 (C. C. A. 9), certiorari denied April 14, 1947, No. 1103, this Term. Certainly then, a member of the armed forces likewise may be required to perform any duties which will best aid the prosecution of the war, independently of his rate or grade, without any expectation that by virtue of such special duties the United States becomes obligated to compensate him for the value of these services.

The denial of such compensation is not peculiar to the armed forces. Additional compensation for performance of duties beyond one's status is similarly denied in the civilian side of the Government where the settled rule is that "The salaries fixed by Congress are the salaries payable to those

who hold the office and not to those who perform the duties of the office." *Coleman* v. *United States,* 100 C. Cls. 41, 43. See also *United States* v. *McLean,* 95 U. S. 750; *Belcher* v. *United States,* 34 C. Cls. 400; *Morey* v. *United States,* 35 C. Cls. 603; *Jackson* v. *United States,* 42 C. Cls. 39; *Dvorkin* v. *United States,* 101 C. Cls. 296.

2. Nor is there any basis for implying from alleged representations which petitioner claimed induced him to enlist, a promise to pay him just and reasonable compensation for whatever work would be required of him during his period of service. These representations, according to the complaint, consisted of statements made by a local recruiting officer, statements in the Navy's published literature, and the "general public knowledge (known to this plaintiff before his enlistment) that the Navy encourages a public belief in its willingness to pay any man in proportion to the skills it exacts from him * * *" (R. 7). The latter two "representations" certainly did not constitute an offer by the Navy to enter such a contract with anyone who enlisted in the Naval Reserve, and they clearly provide no basis for imposing an obligation on the United States to pay petitioner just and reasonable compensation for his services. Nor do the alleged representations made by the local recruiting officer provide any better basis for imposing such an obligation, since the Navy itself, and hence, *a fortiori,* the local recruiting

officer[1] was without authority to vary the compensation fixed for the various grades by the Pay Readjustment Act of 1942, as amended. *Wilber National Bank* v. *United States,* 294 U. S. 120, 123; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *United States* v. *City & County of San Francisco,* 310 U. S. 16, 32.

3. There likewise was no promise, express or implied, to pay petitioner for his services as a title attorney. R. S. 355, as amended, on its face does not contain a promise to compensate anyone who procures land title evidence, but merely authorizes the expenditure of funds by the heads or authorized officers of various departments for the procurement of such evidence from specified appropriations.[2] Thus, the heads of departments or their authorized officers may promise or enter contracts for the payment of the procurement of such evidence, but as has

[1] Petitioner, as a practicing attorney, undoubtedly read his enlistment papers, paragraph 6 of which uniformly states: "I have had this contract fully explained to me, I understand it, and certify that no promise of any kind has been made to me concerning assignment to duty, or promotion during my enlistment." Moreover, there is no allegation in the complaint that petitioner based any of his attempts to change his status on these alleged representations of the local recruiting officer.

[2] In the district court, petitioner relied on that statute as satisfying the exception to R. S. 1764 and 1765 (5 U. S. C. 69, 70) prohibiting the payment of compensation for extra services, unless as stated in R. S. 1765 "The same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensa-

been shown, *supra*, pp. 10–11, there is no basis in the present case for implying that when petitioner was assigned to procure such evidence, there was any contract or promise by a head of department or authorized officer to pay him reasonable compensation for the performance of these duties. On the contrary, all indications point to the fact that such officers demanded and received the services performed by petitioner on the assumption that, irrespective of pay, he was obligated to perform them as a member of the armed forces.

CONCLUSION

The decision below is correct, and there is no conflict of decision. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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tion." That court properly rejected petitioner's contention. See *Converse* v. *United States*, 21 How. 463; *Stansbury* v. *United States*, 8 Wall. 33; *Mullett's Administratrix* v. *United States*, 150 U. S. 566; 3 Op. A. G. 439. In the circuit court of appeals, petitioner apparently cited this statute to support the proposition that "The fact that no compensation had been fixed by law for the position of title attorney is not controlling, since the Navy was authorized to secure and pay for, such services" (R. 25–26).

APPENDIX

1. The pertinent provisions of the Pay Readjustment Act of 1942 (56 Stat. 359, 37 U. S. C. 101, Supp. V, *et seq*) are as follows:[1]

> SEC. 9. The monthly base pay of enlisted men of the Army, Navy, Marine Corps, and Coast Guard shall be as follows: Enlisted men of the first grade, $138; enlisted men of the second grade, $114; enlisted men of the third grade, $96; enlisted men of the fourth grade, $78; enlisted men of the fifth grade, $66; enlisted men of the sixth grade, $54; and enlisted men of the seventh grade, $50. Chief petty officers under acting appointment shall be included in the first grade at a monthly base pay of $126.
>
> For purposes of pay enlisted men of the Army, the Navy, and the Marine Corps, and the Coast Guard shall be distributed in the several pay grades by the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury, respectively.
>
> Every enlisted man paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his grade for each three years of service up to thirty years. Such service shall be active Federal service in any of the services mentioned in the title of this Act or Reserve components thereof; service in the active National Guard of the several States, Ter-

[1] The subsequent amendments to the Act (Act of September 7, 1944, c. 407, Sec. 3, 58 Stat. 729, and Act of June 29, 1946, c. 523, Sec. 1 (a, b), 60 Stat. 343), are irrelevant in this case.

ritories, and the District of Columbia; and service in the enlisted Reserve Corps of the Army, the Naval Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

* * * * *

SEC. 14. Officers, warrant officers, and enlisted men of the Reserve forces of any of the services mentioned in the title of this Act, when on active duty in the service of the United States, shall be entitled to receive the same pay and allowances as are authorized for persons of corresponding grade and length of service in the Regular Army, Navy, Marine Corps, Coast Guard, or Public Health Service.

Officers, warrant officers, and enlisted men of the National Guard, when in the Federal service or when participating in exercises or performing the duties provided for by sections 94, 97, and 99 of the National Defense Act, as amended, shall receive the same pay and allowances as are authorized for persons of corresponding grade and length of service in the Regular Army.

Under such regulations as the Secretary of War may prescribe, officers of the National Guard, other than general officers, and warrant officers and enlisted men of the National Guard, shall receive compensation at the rate of one-thirtieth of the monthly pay authorized for such persons when in the Federal service, for each regular drill, period of appropriate duty, or other equivalent period of training, authorized by the Secretary of War, at which they shall have been engaged for the entire prescribed period of time: *Provided,* That such pay shall be in addition to compensation for

attendance at field or coast-defense instruction or maneuvers. General officers of the National Guard shall receive $500 a year in addition to compensation for attendance at field or coast-defense instruction or maneuvers, for satisfactory performance of their appropriate duties. In addition to pay herein provided, officers of the National Guard commanding organizations less than a brigade and having administrative functions connected therewith shall, whether or not such officers belong to such organizations, receive not more than $240 a year for the faithful performance of such administrative functions under such regulations as the Secretary of War may prescribe: *Provided,* That the provisions of this paragraph shall not apply when such persons are on active duty in the Federal service.

2. R. S. 355, as amended (34 U. S. C. 520), provides in part as follows:

* * * * *

The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

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